In the Supreme Court of the United States

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v.
STEPHEN G. MILLS.
No. 503.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

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v.
STEPHEN C. MILLS. } No. 509.

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STATEMENT.

By reason of certain services in the Philippine Islands set forth in the record, pages 1 and 2, appellee, Stephen C. Mills, was entitled to 10 per cent increase on his "pay proper." He was paid the 10 per cent based on the minimum pay of his rank, exclusive of all longevity increase. He contends that the 10 per cent increase should be computed upon the full maximum pay to which he is entitled, including longevity pay. In other words, it is the contention of claimant that the term "pay proper" means the entire pay, including the longevity increase, and that the 10 per cent allowed him for services beyond the continental limits of the United States and the Territories contiguous thereto should be paid on this maximum pay.

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The Government's contention is that the per cent of increase was properly computed upon the normal or minimum pay of the grade and not upon the current yearly pay, which includes the increase of pay for length of service. The statutes granting the increase of pay being the acts of May 26, 1900, and March 2, 1901. (31 Stat. L., pp. 211 and 903, respectively.)

The difference in the basis of calculation amounts to the sum of $188.87, for which sum the Court of Claims gave judgment. (Record, p. 5.)

ASSIGNMENT OF ERROR.

The appellant assigns the following error in the judgment of the Court of Claims:

The court erred in rendering judgment in favor of claimant in any amount whatever.

ARGUMENT.

The question presented turns upon the meaning of the words "pay proper," as used in the statute of May 26, 1900, making appropriations for the support of the Regular and Volunter Army for the fiscal year ending June 30, 1901, and as used in the statute passed March 2, 1901. The statutes are as follows:

In the act of May 26, 1900, making appropriation for the support of the Regular and Volunteer Army for the fiscal year ending June 30, 1901, Congress provided in part as follows:

> For additional twenty per centum increase on pay of enlisted men, four million five hundred and twenty-four thousand seven hundred and fifteen dollars: *Provided*, That hereafter

> the pay proper of all officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii, and in the Territory of Alaska, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law in time of peace. (See 31 Stat. L., p. 211.)

In the act passed March 2, 1901, entitled, "An act making appropriation for the support of the Army for the fiscal year ending June 30, 1903," Congress provided in part as follows:

> *Provided*, That hereafter the pay proper of all officers and enlisted men serving beyond the limits of the States comprising the Union, and the Territories of the United States contiguous thereto, shall be increased ten per centum for officers and twenty per centum for enlisted men over and above the rates of pay proper as fixed by law for time of peace, and the time of such service shall be counted from the date of departure from said States to the date of return thereto:
>
> *Provided further*, That the officers and enlisted men who have served in China at any time since the twenty-sixth day of May, nineteen hundred, shall be allowed and paid for such service the same increase of pay proper as is herein provided for. (See 31 Stat. L., p. 903.)

The Comptroller of the Treasury, in passing upon a similar statute, said:

> The question presented turns upon the meaning of the words "pay proper of enlisted men,"

as used in said section 6 of the act approved April 26, 1898. Was it intended by said section 6 to limit the 20 per cent increase to rates of pay prescribed in said section 1280, being the minimum or lowest pay of each grade, or was it intended that the 20 per cent increase should also be computed upon the additions to a soldier's pay to which he may be entitled for length of service, reenlisting, or a certificate of merit? The term "pay proper" seems to have been employed in the earlier decisions and opinions as a means of distinguishing with greater accuracy between "pay" and "allowances." On August 15, 1852, Second Comptroller Phelps, in passing upon a claim for emoluments or allowances under a private act granting 35 years' half pay, used the following language:

"The term 'half pay' is one that is very commonly used in our statutes, and has long ago acquired in commerce, as well as at the Departments and in the courts, a distinct and well-understood legal significance. It has always been construed to mean half the *pay proper* of the officer, exclusive of his emoluments and allowances, which are entirely distinct from the pay, are greater in amount, authorized by different enactments, and payable out of other appropriations.

"A familiar instance of this construction will be found in the numerous military and naval half-pay pensions which have always been understood as authorizing half pay proper."

In computing the three months' extra pay given by the act of July 19, 1848 (9 Stat.,

248), for service in the war with Mexico, it was the rule to include only what the soldier was entitled to receive by way of stated compensation, as distinguished from allowances or emoluments; and, in order to more clearly define the distinction, the words "pay proper" were used in the decisions construing said act. The words "pay proper" were apparently first used in legislation in section 4 of the act of March 3, 1865 (13 Stat., 497), which granted an addition of three months' *pay proper* to certain officers of the Volunteer Army who should serve to the end of the war, to be paid on their discharge. The words were also used in section 1, act of March 2, 1867 (14 Stat., 422), granting an increase of 33⅓ per cent of the *pay proper* of certain officers of the army for two years after July 1, 1866. In computing the three months' pay proper under the act of March 3, 1865, where an officer was discharged after July 1, 1866, and was therefore entitled to the one-third increase provided for in said act of March 2, 1867, such increase was included, thus treating it as a part of "pay proper." (Dec. Second Comptroller, vol. 45, p. 129.) These cases are the only ones I have been able to find where the words "pay proper" have been construed as including or excluding increased pay. Officers of the Army, before the act of 1867, received no increase over their regular rate of pay, except by way of rations for longevity under the act of July 5, 1838 (5 Stat., 258), which was never treated as pay. Since the legislation and decisions above referred to the

words "pay proper of enlisted men" have been employed in different appropriation acts with such uniformity as to give them a definite and technical meaning. In the act of June 30, 1886 (24 Stat., 93), making appropriations for the support of the Army, separate and distinct appropriations were made for the "pay proper of enlisted men of all grades" and for "pay to enlisted men by reason of length of service in addition to their regular pay." Appropriations have been made in substantially the same language for each succeeding year from 1886 to the present time.

In the act of Congress entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1899," approved March 15, 1898, is the following provision:

"For pay proper of enlisted men of all grades, four million two hundred and ninety thousand dollars.

"Additional pay for length of service, including hospital corps, six hundred seventy-one thousand one hundred and seventy-two dollars."

Statutes upon the same or similar subjects should be taken into consideration in construing the law, and the same meaning given to the same words used in both, unless a contrary meaning is clearly intended. By the above act, and in each act making the annual appropriations for the support of the Army from and including 1886 to the present time, Congress has so distinguished "pay proper of enlisted men" from "additional pay for length of serv-

ice" as to amount to a legislative declaration that in the use of the words "pay proper of enlisted men" it does not mean "additional pay for length of service." (4th Comp. Dec., 669–672.)

THE TYLER CASE.

"CURRENT YEARLY PAY."

The claimant relies upon the case of *Tyler* v. *The United States* (105 U. S., p. 244). The statute under consideration in the Tyler case is as follows (section 1262):

> There shall be allowed and paid to each officer below the rank of brigadier-general, including chaplains, and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service.

Claimant's counsel insist that this statute involves substantially the same question as the law under consideration. There is, however, practically no similarity between the case at bar and the Tyler case. In the Tyler case the court was construing the meaning of the words "current yearly pay" for the purpose of fixing the basis for 10 per cent longevity pay, and the court said:

> We also hold that the words "current yearly pay" in section 1262 require that, when the increased pay for any period of five years is to commence, the 10 per cent must be counted on the regular salary added to its increase by any previous periods of five years; so that the original salary of the rank, and any additions

> of 10 per cent previously earned for periods of five years, constitute the current yearly pay on which said 10 per cent is to be calculated.

It will be seen that the court applies the term "regular salary" to the salary as fixed by section 1261, which said regular pay plus the increased pay, in the opinion of the court, constituted the officer's "current yearly pay."

There the court was simply construing the term "current yearly pay," as found in section 1262. It may be pertinently added that immediately after this decision Congress provided—

> that from and after the first day of July, eighteen hundred and eighty-two, the ten per cent increase for length of service allowed to certain officers by section twelve hundred and sixty-two of the Revised Statutes, shall be computed on the *yearly pay of the grade* fixed by sections twelve hundred and sixty-one and twelve hundred and seventy-four, Revised Statutes. (See 22 Stat. L., p. 118.)

But in the case at bar the court is not required to construe the phrase "current yearly pay." The words do not occur in the statute under consideration. The court is required to give its interpretation of the words "pay proper," as used in the act of May 26, 1900, and the act of March 2, 1901.

The word "current," as used in the phrase "current yearly pay," has a definite and fixed signification. "Current yearly pay," as used in the Tyler case, means the current or running pay of the officer, in-

cluding all extras, percentages, and everything that is included in the sum total of the officer's pay. The term "pay proper," however, would seem to be the pay of the grade aside from all extras and allowances. When speaking of the "pay of the grade," we mean the pay of the grade as fixed by section 1261 of the Revised Statutes. What better or more distinctive term could Congress have used in the various acts granting extras and allowances than the term "pay proper?" The pay fixed by section 1261 is properly speaking, the pay of the officers therein mentioned and therefore is the "pay proper"—all additions to this pay being extra pay, by reason of longevity, or of some particular place or time of service and allowance. Taken, therefore, in the light of all legislation upon the subject of pay and giving the words their normal meaning, the phrase "pay proper" is the appropriate and natural language to designate the pay described in section 1261, as distinguishing it from the full compensation, with all extras, longevity pay, and allowances, added thereto.

For the foregoing reasons it is insisted that the judgment of the Court of Claims was erroneous and should be reversed.

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